## National Labor Relations Board



# Weekly Summary of NLRB Cases

Division of Information	Washington, D.C. 20570	Tel. (202) 273-1991
April 2, 2004		W-2941
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(OM 04-43): Revisions to GC Policy Regarding Use of Internet E-mail by Outside Parties to Submit Documents to Regional Offices—Representation Case Documents

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Community Bus Lines/Hudson County Executive Express (22-CA-25124, et al.; 341 NLRB No. 61) Jersey City, NJ March 26, 2004. The Board affirmed the administrative law judge's conclusion that the Respondent violated Section 8(a)(1), (3), and (4) of the Act when it discharged owner-operator Jesus Pimental in retaliation for his activities for Production Workers Local 148 and his participation in the representation and unfair labor practice proceedings involving the Respondent. It also affirmed the judge's finding that the Respondent did not violate the Act when it prevented owner-operator Herman Ocampo from using substitute drivers or by later constructively discharging Ocampo. [HTML] [PDF]

The Respondent operates minibuses carrying passengers between Jersey City and New York City and employs 13 drivers to drive its minibuses. It contracts with approximately 10 owner-operators to service these routes with their own vans and minibuses, driven either by the owner-operators themselves or by substitute drivers. The Respondent contended that the owner-operators are independent contractors and consequently are not protected by the Act.

The Board agreed with the judge's finding that the owner-operators are employees under Section 2(3) of the Act. Citing *BKN*, *Inc.*, 333 NLRB 143, 144 (2001), the Board wrote that "the party asserting that the alleged discriminates are independent contractors bears the burden of proving such status." In the instant matter, it concluded that the Respondent failed to carry its burden and has not offered into evidence any contract it entered into with owner-operators and thus failed to demonstrate that the parties believed they were creating an independent contractor relationship.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Jesus Pimentel and Herman Ocampo, Individuals; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Newark on April 1, 2003. Adm. Law Judge Joel P. Biblowitz issued his decision June 12, 2003.

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Petrochem Insulation, Inc. (21-RC-20619; 341 NLRB No. 60) Rancho Dominguez, CA March 24, 2004. Contrary to the hearing officer, the Board sustained the Petitioner's (Asbestos Workers Local 5) Objection 2 alleging that the Employer interfered with the election by threatening the loss of wages and benefits if employees voted for the Petitioner. The Board set aside the election and directed a second election. The tally of ballots showed 14 ballots for the Petitioner, 71 for the Intervenor (Petroleum and Industrial Workers), and 16 challenged ballots, an insufficient number to affect the results of the election. [HTML] [PDF]

The Petitioner objected to the Employer's memo to its employees, which stated in pertinent part:

Local 5 says Petrochem does not want you to vote for Local 5. We don't. Petrochem does not want to lower your wages and benefits and have 2 Union contracts that discriminate against employees. Petrochem wants all employees to be treated the same.

The hearing officer found that this statement was not objectionable because it was merely an expression of the Employer's desire to maintain the status quo and because the Petitioner did not show that employees viewed the statement as a threat. The Employer has a contract with the Intervenor.

The Board disagreed with the hearing officer. In its view, the hearing officer improperly focused on the employees' subjective reactions to the Employer's statement. The Board believed that the employees could reasonably interpret the Employer's statement as a threat that if the Petitioner won, they would face reduced wages and benefits.

(Chairman Battista and Members Liebman and Walsh participated.)

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Cellco Partnership, d/b/a Verizon Wireless (31-RC-8072; 341 NLRB No. 63) Bakersfield, CA March 26, 2004. The Board, in agreement with the Regional Director, held that the petitioned-for multifacility unit of sales representatives and assistant-sales operations employees working at three of the Employer's retail facilities in Bakersfield, CA is appropriate for bargaining and remanded this matter to the Regional Director for further processing. [HTML] [PDF]

The Regional Director found that the petitioned-for employees share a community of interest that is separate and apart from that shared with other employees and that they constitute an appropriate unit for bargaining. The Employer argued that a "systemwide unit" of all such employees in either its West area or its Northern California/Nevada region, is the only unit appropriate for bargaining because the Employer is a public utility.

After granting the Employer's request for review, the Board directed the parties to address three questions: (1) whether the Board's presumption in favor of systemwide units for public utilities applies to the cellular telephone industry; (2) if so, whether the presumption extends to units composed solely of sales employees employed in retail stores; and (3) irrespective of whether the presumption applies, is the petitioned-for unit of 29 retail sales representatives and assistant-sales operations employees at the Employer's retail facilities in Bakersfield, CA appropriate?

The Board wrote that it has never squarely addressed the issue of whether retail employees of a public utility fall within the policy considerations behind the systemwide presumption. It stated that the Board's standards with respect to units in the public utility industry do not apply to the type of retail employees at issue in this case. As such, the Board held that the petitioned-for multifacility unit meets the Board's traditional standards of appropriateness.

(Members Schaumber, Walsh, and Meisburg participated.)

#### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*Pro-Tek Fire Suppression, Inc.* (Road Sprinkler Fitters Local 669) Morris, OK March 18, 2004. 17-CA-22013; JD(SF)-19-04, Judge Gregory Z. Meyerson.

*United States Postal Service* (an Individual) Cincinnati, OH March 25, 2004. 9-CA-40244(P); JD(ATL)-18-04, Judge Keltner W. Locke.

Finch, Pruyn & Co., Inc. (Paper, Allied-Industrial, Chemical & Energy Workers) Glens Falls, NY March 26, 2004. 3-CA-23461-1, -2; JD-22-04, Judge Bruce D. Rosenstein.

*Marc Glassman, Inc.* (Food & Commercial Workers [UFCW] Local 880) Cleveland, OH March 26, 2004. 8-CA-34205; JD(ATL)-19-04, Judge George Carson II.

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#### **TEST OF CERTIFICATION**

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the ground that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

Cooper Tire & Rubber Co. (Electrical Workers [IBEW] Local 1634) (18-CA-17152; 341 NLRB No. 64) Cedar Rapids, IA March 25, 2004. [HTML] [PDF]

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## LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)

Mountaineer Park, Inc., Chester, WV, 6-RC-12229, March 23, 2004

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(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

J.L. Marshall & Sons, Inc., Seekonk, MA, 1-RC-21682, March 23, 2004 Advanced Architectural Metals, Inc., Las Vegas, NV, 28-UC-231, March 25, 2004 Kapiolani Medical Center for Women and Children, et al., Honolulu, HI, 37-AC-38, 40, March 25, 2004

Nursing Care Center at Medford, Inc. N & W Agency, Inc., et al., 29-RC-10099, March 25, 2004

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### Miscellaneous Board Orders

# NOTICE TO SHOW CAUSE [why the Employer's motion to revoke Petitioner's certification should not be granted] (Due 4/8/04)

Margate Towers Condominium Association, Inc., Margate, NJ, 4-RC-20486, March 25, 2004

## CERTIFICATION OF REPRESENTATIVE AS BONA FIDE UNDER SECTION 7(b) OF THE FLSA

City of Oceanside, Oceanside, CA, 21-WH-17, March 25, 2004

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